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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GORDON LEE BRADFORD,

Petitioner,

v.

JOHN P. WHITLEY, WARDEN OF THE LOUISIANA STATE PENITENTIARY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the fifth and fourteenth amendments preclude the admission of a criminal defendant's illegally obtained confession into evidence for impeachment purposes in the absence of limiting instructions restricting the jury's consideration of the confession to credibility issues?

LIST OF ALL PARTIES

Gordon Lee Bradford;

John P. Whitley, Warden, Louisiana State Penitentiary; and

The State of Louisiana.

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GORDON LEE BRADFORD,

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JOHN P. WHITLEY, WARDEN OF THE LOUISIANA STATE PENITENTIARY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE UNITED STATES:

Gordon Lee Bradford petitions for a writ of certiorari asking this Court to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the district court's denial of Bradford's petition for relief under the writ of habeas corpus, 28 U.S.C. § 1254(1) (1989).

OPINIONS BELOW

This case arises from the final judgment of the United States District Court for the Western District of Louisiana in Civil Action No. 89-1273, adopting a magistrate's recommendation. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 953 F.2d 1008 (5th Cir. 1992). Copies of the magistrate's report and recommendation, the district court's judgment, and the Fifth Circuit's opinion are reprinted in the Appendix to this petition.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its judgment on February 21, 1992. The Fifth Circuit denied Bradford's petition for rehearing on March 23, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1) (1988). The district court had jurisdiction over the writ of habeas corpus brought by a state prisoner under 28 U.S.C. § 2254 (1989).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of life liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

On September 17, 1982, a Louisiana state court jury convicted Gordon Lee Bradford of attempted manslaughter and attempted armed robbery (Tr. 932). On February 24, 1983, the trial court sentenced Bradford to the maximum penalties of 10½ years at hard labor on the attempted manslaughter conviction and 49½ years at hard labor without benefit of parole, probation, or suspension of sentence on the attempted armed robbery conviction; the sentences were to be served concurrently (Tr. 984-85). A Louisiana court of appeals affirmed Bradford's convictions on March 7, 1984. *State v. Palmer*, 447 So.2d 1159 (La. App. 3d Cir. 1984). The same court later granted Bradford's application for post-conviction relief and vacated his conviction and sentence for attempted manslaughter on grounds of double jeopardy. *State v. Bradford*, 514 So.2d 534, 535 (La. App. 3d Cir. 1987). His sentence of 49½ years at hard labor remained in effect. The Louisiana Supreme Court denied Bradford's writ, 523 So.2d 226 (La. 1988), and this Court denied certiorari. 488 U.S. 835 (1988).

Bradford filed a petition for writ of habeas corpus by a person in state custody under 28 U.S.C. § 2254 (1989) in the United States District Court for the Western District

of Louisiana on June 5, 1989; among other grounds, Bradford asserted that his confession was obtained illegally and that its admission at trial violated the fifth amendment as interpreted in *Edwards v. Arizona*, 451 U.S. 477 (1980), and *Miranda v. Arizona*, 384 U.S. 436 (1966) (R. 1). On August 9, 1990, the district court adopted the report and recommendation of United States Magistrate Pamela Tynes (R. 106-26) and dismissed Bradford's application for the writ (R. 171).

Bradford filed a notice of appeal from the judgment dismissing his application on August 23, 1990 (R. 173). Although the district court denied Bradford's request for a certificate of probable cause on September 12, 1990 (R. 197), the Fifth Circuit granted Bradford's request for a certificate of probable cause on January 3, 1991. The Fifth Circuit then affirmed the denial of Bradford's writ. *Bradford v. Whitley*, 953 F.2d 1008 (5th Cir. 1992).

The magistrate concluded Bradford initiated the conversation with police that led to the confession, and recommended that the district court find the confession was admissible under *Plazinich v. Lynaugh*, 843 F.2d 836, 839 (5th Cir. 1988), *cert. denied* 488 U.S. 1031 (1989) (R. 111). The district court adopted the magistrate's reasoning (R. 171). The record, however, shows Bradford did not initiate the conversation (*See, e.g.*, Tr. 407-14). The Fifth Circuit expressly declined to decide who initiated the conversation, and instead premised its analysis on the confession's admissibility for impeachment purposes regardless of its illegality. *Bradford*, 953 F.2d at 1010.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT CREATED A CONFLICT WITH OTHER CIRCUITS BY APPROVING THE ADMISSION OF AN ILLEGALLY OBTAINED CONFESSION FOR IMPEACHMENT PURPOSES WITHOUT LIMITING INSTRUCTIONS

A. In Conflict with this Fifth Circuit decision, the Ninth Circuit Holds that Limiting Instructions are Required when Admitting a Confession Only for Impeachment Purposes

Gordon Lee Bradford's state court conviction rests upon the use at trial of a confession obtained in violation of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1980) and *Miranda v. Arizona*, 384 U.S. 436 (1966). Relying on *Harris v. New York*, 401 U.S. 222, 225 (1971), and *Oregon v. Hass*, 420 U.S. 714, 722 (1975), the Fifth Circuit held that Bradford's confession was admissible even if illegally obtained because the prosecution used it only for impeachment. *Bradford*, 953 F.2d at 1010-11.

The panel affirmed Bradford's conviction even though the trial judge admitted the illegally obtained confession into evidence without instructing the jury to consider it for only the limited purpose of assessing Bradford's credibility. This ruling directly conflicts with the Ninth Circuit's holding that a defendant's illegal confession can be used for impeachment purposes only if accompanied by an appropriate limiting instruction.

In *Hinman v. McCarthy*, 676 F.2d 343, 349 (9th Cir. 1982), *cert. denied* 459 U.S. 1048 (1983), the Ninth Circuit

recognized that confessions obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), may only be admitted for impeachment purposes under *Harris* if the trial court issues a "proper instruction advising the jury of the limited use of the statement." *Hinman*, 676 F.2d at 349. If the trial court fails to issue the requisite limiting instruction, the reviewing court must treat the confession as improperly admitted evidence that demands reversal unless it is certain beyond a reasonable doubt that the evidence was harmless.[1] *Id.* After *Hinman*, district courts in the Ninth Circuit have been bound to instruct the jury that any confession taken in violation of *Miranda* is to be used only for the purpose of evaluating the credibility of the defendant and not for directly determining his guilt. *See, e.g., Duran v. Stagner*, 620 F.Supp. 803, 805 (N.D.Cal. 1985) (*Hinman* "enjoins the trial courts of this circuit to properly instruct that statements which are not taken in accordance with the rule of *Miranda*, and which are used properly in accordance with *Harris* . . . may be considered only for the purpose of evaluating the credibility of the declarant/witness").

Here, the Fifth Circuit panel concluded that the illegal confession was admissible because "the state used the confession only for impeachment purposes on three occasions during cross-examination." *Bradford*, 953 F.2d at 1011. The opinion also suggests that any error was waived when defense counsel was forced to play the

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[1] The Fifth Circuit panel did not consider the impact of the illegal confession at Bradford's trial because it concluded that no error occurred in admitting his illegal confession for impeachment purposes.

entire tape of Bradford's illegal confession to demonstrate its untrustworthiness. *Id.*

This analysis ignores courtroom realities. Given a situation in which the prosecution had introduced portions of Bradford's confession without limiting instructions, defense counsel faced a Catch-22. Absent limiting instructions, the jury was free to consider Bradford's confession on the merits of guilt or innocence. And yet, playing the rest of the confession to demonstrate its untrustworthy nature risked emphasizing its importance and inviting waiver arguments.

In failing to consider these factors, the Fifth Circuit ignored the concern for limiting instructions and trustworthiness underlying this Court's pronouncements in *Hass*, 420 U.S. at 722, and *Harris*, 401 U.S. at 224. Neither *Harris* nor *Hass* grants prosecutors carte blanche to impeach with an illegal and untrustworthy confession admitted without proper cautionary instructions.

This Court should grant certiorari to settle this conflict between the Fifth and Ninth Circuits.

B. Limiting Instructions Also Are Required When Admitting a Co-Defendant's Guilty Plea for Impeachment Purposes

Most circuits, including the Fifth Circuit itself, require courts to give limiting instructions when admitting a co-defendant's guilty plea for impeachment. And yet, the Fifth Circuit's holding in this case excuses the

failure to provide limiting instructions when the prosecution uses an even more potent weapon – an illegal confession from the defendant's own mouth.

The circuit courts' analysis of guilty pleas by co-defendants mirrors this Court's treatment of confessions in violation of *Miranda*. Thus, a co-defendant's guilty plea is admissible for assessing credibility but not for determining the defendant's substantive guilt. *See, e.g., United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983). When a co-defendant's guilty plea is admitted for credibility purposes, trial judges are directed to give limiting instructions to the jury.

Thus, the Fifth Circuit allows a co-defendant's guilty plea to be disclosed at trial only if "the evidence serves a legitimate purpose and the jury is given a clear, cautionary instruction that it may consider the accomplice's guilty plea only to assess his credibility as a witness and not to create an inference of guilt against the accused." *United States v. Magee*, 821 F.2d 234, 241 (5th Cir. 1987). *Accord United States v. Marroquin*, 885 F.2d 1240 (5th Cir. 1989), *cert. denied* 494 U.S. 1079 (1990); *United States v. Borchardt*, 698 F.2d 697 (5th Cir. 1983), *cert. denied* 469 U.S. 937 (1984). This concern over the corrosive effect of a co-defendant's confession admitted without limiting instructions predates *Harris'* creation of an impeachment exception to *Miranda*. *See United States v. Harrell*, 436 F.2d 606, 614 (5th Cir. 1970), *cert. denied* 409 U.S. 846 (1971); *United States v. Baete*, 414 F.2d 782, 784 (5th Cir. 1969).

Other circuits are equally clear in their requirements of limiting instructions in the co-defendant context. In *United States v. Halbert*, 640 F.2d 1000 (9th Cir. 1981), the

Ninth Circuit reversed a conviction because the trial judge admitted a co-defendant's guilty plea without limiting instructions. It held that the instructions must be in "unequivocal language" such that "a reasonable juror would understand the limited use to be made of the pleas." *Id.* at 1007. *See also United States v. Rewald,* 889 F.2d 836 (9th Cir.), *amended* 902 F.2d 18 (1989), *cert. denied* 111 S.Ct. 64 (1990).

The Tenth Circuit also has reversed convictions where evidence is admitted without a limiting instruction. "Because of the potential for prejudice, cautionary instructions limiting the jury's use of the guilty plea to permissible purposes are critical." *United States v. Baez,* 703 F.2d 453, 455 (10th Cir. 1983). *Accord United States v. Mobile Materials, Inc.,* 881 F.2d 866 (10th Cir. 1989), *cert. denied* 493 U.S. 1043 (1990); *United States v. Dunn,* 841 F.2d 1026 (10th Cir. 1988). Similarly, the Eighth Circuit holds that jury instructions limiting a co-defendant's plea to credibility purposes are required out of fairness to the defendant. *United States v. Wiesle,* 542 F.2d 61, 62 (8th Cir. 1976). Like the other circuits, the Eighth Circuit requires the judge to issue limiting instructions. *See United States v. Campbell,* 848 F.2d 846 (8th Cir. 1988); *United States v. Roth,* 736 F.2d 1222 (8th Cir. 1984), *cert. denied* 469 U.S. 1058 (1985).

Other circuits also require limiting instructions when the trial court admits a co-defendant's plea. *United States v. Gambino,* 926 F.2d 1355, 1363-64 (3rd Cir.), *cert. denied* 111 S.Ct. 2800 (1991); *United States v. Smith,* 893 F.2d 1269, 1272-73 (11th Cir. 1990); *United States v. Sanders,* 893 F.2d 133, 136-37 (7th Cir. 1990); *United States v. Taratino,* 846 F.2d 1384, 1405 (D.C. Cir.), *cert. denied* 488 U.S. 867 (1988);

United States v. Dailey, 759 F.2d 192, 200 (1st Cir. 1985); *United States v. Pickett*, 746 F.2d 1129, 1135-36 (6th Cir. 1984), *cert. denied* 469 U.S. 1226 (1985).

If the threat of constitutional taint mandates limiting instructions in the co-defendant confession context, what possible rationale excuses such instructions when the prosecution uses a defendant's *own* illegal confession against him at trial? A jury surely is more likely to go beyond credibility assessments and use the defendant's confession to determine guilt than it is to use a co-defendant's confession in the same manner. The uniformity among the circuits in requiring limiting instructions to accompany a co-defendant's confession underscores the impropriety of admitting a defendant's own illegally obtained confession without any limiting instructions. Certiorari is appropriate here to ensure that juries are properly instructed so that confessions are used only in compliance with this Court's decisions in *Harris* and *Hass*.

II. THE IMPORTANCE OF THE IMPEACHMENT EXCEPTION TO THE BAN ON ADMISSION OF ILLEGAL CONFESSIONS DEMANDS A DEFINITIVE RULE REQUIRING LIMITING INSTRUCTIONS

This Court has circumscribed the use of illegally obtained confessions for impeachment purposes by stressing the presence of limiting instructions in *Harris* and *Hass*. The Fifth Circuit's decision casts aside this consideration, and in so doing sanctions a violation of the fifth amendment.

This Court has firmly established that a defendant's confession taken in violation of *Miranda* and *Edwards* is

not admissible in the prosecution's case-in-chief against the defendant, or to provide substantive evidence of guilt. *See United States v. Havens*, 446 U.S. 620, 627 (1980); *Harris*, 401 U.S. at 225. However, illegally obtained confessions are admissible to impeach a defendant in certain circumstances. *See Hass*, 420 U.S. at 722.

In illuminating this bright line between evidence admitted for impeachment purposes and evidence admitted to show substantive guilt, this Court has engaged in careful balancing of the values underlying *Miranda's* exclusionary rule. *See James v. Illinois*, 493 U.S. 307 (1990) (rejecting state's argument for impeachment exception to permit prosecutors to impeach defense witness with illegally obtained evidence). The primary values balanced by the Court are the need to deter police officers from violating *Miranda* and the need to prevent defendants from using a confession's illegality as a license to lie on the stand. *Id.* at 313-14.

When the Court balanced these concerns in *Harris*, it stressed that "[t]he trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt." *Harris*, 401 U.S. at 222. Similarly, the trial court in *Hass* told the jury "that the portion of the police officer's testimony describing the statement made by Hass to him 'may not be used by you as proof of the Defendant's guilt . . . but you may consider that testimony only as it bears on the [credibility] of the Defendant as a witness when he testified on the witness stand.' " *Hass*, 420 U.S. at 717. In both cases, this Court held that the balancing test allowed an illegal confession to be admitted for impeachment purposes

because illuminating the defendant's credibility outweighed the harm of creating incentives for police to proceed illegally.

This Court has not yet decided whether, in the absence of limiting jury instructions, this balance must change. Petitioner believes the balance must be changed; the proposition that a jury would, without instruction, somehow know it could consider a defendant's illegally obtained confession only for impeachment ignores the practicalities of the courtroom.

As this Court observed in *Arizona v. Fulminante*, 111 S.Ct. 1246, 1257-58 (1991), "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him.' . . . [It] may tempt the jury to rely upon that evidence alone in reaching its decision." *Fulminante*, 111 S.Ct. at 1257-58 (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)). In the trial below, the jurors received no instructions from the judge regarding how they were to evaluate Bradford's illegally obtained confession. Absent limiting instructions, the jury was free to use the illegally obtained confession not just in determining credibility, but in deciding Bradford's substantive guilt or innocence. The jury did just that.

Because this Court has determined that justice is served only by limiting the use of illegally obtained confessions to impeachment, it is critical that judges plainly instruct juries to limit their consideration of an illegal confession to that precise purpose. Absent limiting

instructions, jurors cannot possibly be expected to distinguish credibility evidence from evidence of guilt – or even to know the law expects them to do so. The possibility for prejudice is too great; the possibility for undermining the careful balance struck in *Miranda, Edwards,* and *Harris* is too great. The Court should grant certiorari in order to rule that trial courts must instruct juries to consider an illegal confession only to evaluate the defendant's credibility when such a confession is admitted for impeachment purposes.

CONCLUSION

Gordon Lee Bradford asks this Court to grant his petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Bradford further requests all other relief to which he may be entitled.

Respectfully submitted,

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Gordon Lee BRADFORD,

Petitioner-Appellant,

v.

John P. WHITLEY, Warden, Louisiana State Penitentiary, Respondent-Appellee.

No. 90-4640.

United States Court of Appeals,
Fifth Circuit.

Feb. 21, 1992.

Defendant who had been convicted of attempted manslaughter and armed robbery petitioned for federal habeas relief. The United States District Court for the Western District of Louisiana, John M. Shaw, Chief Judge, denied petition, and defendant appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) prosecutor could use edited transcript of confession allegedly obtained in violation of defendant's Fifth Amendment right to counsel, as long as such use was limited to impeachment purposes; (2) defendant was not denied effective assistance of counsel by trial attorney's failure to raise double jeopardy defense; and (3) maximum sentence of 49.5 years imprisonment without possibility of parole was not so excessive as to amount to cruel and unusual punishment.

Affirmed.

Sarah Duncan, San Antonio, Tex. and Fulbright & Jaworski, William J. Boyce, Houston, Tex. (court appointed), for petitioner-appellant.

Richard Weimer, Asst. Dist. Atty., Lafayette, La. and William J. Guste, Jr., Atty. Gen., Baton Rouge, La., for respondent-appellee.

Appeal from the United States District Court for the Western District of Louisiana.

Before POLITZ, Chief Judge, BROWN and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Gordon Lee Bradford appeals the district court's denial of his petition for a writ of habeas corpus stemming from his 1982 conviction by a Louisiana jury for attempted manslaughter and armed robbery.[1] Bradford challenges his continued confinement on several grounds, but his chief complaint is that the prosecution violated his privilege against self-incrimination by using his confession against him at trial in violation of *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1980). Because this and all of Bradford's other assignments of error are without merit, we affirm the decision of the court below denying his petition.

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[1] The grisly events of Bradford's crime are recounted in *State v. Palmer*, 447 So.2d 1159, 1162-63 (La.App. 3d Cir.1984). Bradford was sentenced to 10.5 years imprisonment at hard labor on the attempted manslaughter conviction, to run concurrently with a sentence of 49.5 years at hard labor, without benefit of parole, probation or suspension of sentence, on the attempted armed robbery convictions. *Id.* at 1162.

I.

BRADFORD'S CONFESSION

In his brief, petitioner asserts "[t]he most damaging assault on Bradford's rights stems from the admission and use of an improperly obtained confession at trial" – a confession he made while in custody at the police station following his arrest, and after he had twice asked to speak with an attorney as provided by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[2] Lafayette police twice read Bradford his *Miranda* rights; each time, the suspect told them he wanted to speak with an attorney. Nevertheless, following further conversations with the police, Bradford agreed to tape-record a confession.

Determining who initiated the conversation after Bradford invoked his right to counsel is essential to a Fifth Amendment inquiry. *Edwards*, a decision aimed at preventing police from pressuring defendants into waiving their previously asserted *Miranda* rights, recognized that it is "inconsistent with *Miranda* and its progeny for the authorities, *at their instance*, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Edwards*, 451 U.S. at 485, 101 S.Ct. at 1885 (emphasis added). Accordingly, *Edwards* held that "when an accused has invoked his right to have counsel present

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[2] *Miranda* held that once an individual in custody invokes his right to counsel, police interrogation "must cease until an attorney is present"; at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* 384 U.S. at 474, 86 S.Ct. at 1627.

during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights." *Id.* at 484, 101 S.Ct. at 1884-85. A suspect who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*" *Id.* at 484-85, 101 S.Ct. at 1885 (emphasis added).[3]

In this case, the state court, after a suppression hearing, declined to prevent introduction of Bradford's confession. The federal district court adopted a magistrate's finding, based on the state court record, that Bradford reinitiated the discussion with the police. *See Plazinich v.*

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[3] The Court has since voiced its support of the *Edwards* per se rule. Most recently, in *Minnick v. Mississippi*, ___ U.S. ___, 1111 S.Ct. 486, 112 L.Ed.2d 489 (1990), the Court held that where the accused has requested and been provided with an attorney, the police may not later reinitiate their interrogation in an interview in which the accused is compelled to attend without counsel. "In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning," Justice Kennedy wrote for the majority. "Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.* 111 S.Ct. at 491.

Lynaugh, 843 F.2d 836 (5th Cir. 1988). We decline, however, to pursue the question who "initiated" the conversation leading to Bradford's confession, because it was not introduced in the state's case in chief against Bradford.

While *Edwards* prevents the prosecution from using Bradford's confession as substantive evidence, it is well-settled that his statement may still be introduced to impeach his false or inconsistent testimony. *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). In *Harris*, Chief Justice Burger explained: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury." *Id.* at 225, 91 S.Ct. at 645. *See also Oregon v. Hass*, 420 U.S. 714, 722, 95 S.Ct. 1215, 1221, 43 L.Ed.2d 570 (1975) (Blackmun, J.) ("[T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances.").

Most recently, the Court held that the prosecution may use a defendant's post-arraignment statements for impeachment purposes even when those statements were obtained in contravention of the defendant's Sixth Amendment right to counsel. *Michigan v. Harvey*, 494 U.S. 344, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990).[4] *Harvey*

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[4] The Sixth Amendment counterpart to the *Edwards* prophylactic rule is *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), which held that after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a police-initiated discussion is presumed invalid. *Jackson* similarly provides that evidence obtained pursuant to such a waiver is inadmissible in the prosecution's

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recognized the need to safeguard the defendant's right to counsel while preventing him from committing perjury and thus undermining the integrity of the trial. When a defendant chooses to take the stand, he assumes an obligation to speak truthfully. That the government may have resorted to unconstitutional means to obtain a confession does not mean the defendant is justified in turning the illegality to his advantage, thereby preventing the prosecution from exposing his prior inconsistent statements at trial. *Id.*

Here, after Bradford chose to testify in his own defense, the state used the confession only for impeachment purposes on three occasions during cross-examination. When the prosecution completed its cross-examination, Bradford's attorney prevailed upon the trial judge to play a tape recording of Bradford's entire confession for the jury.[5] The trial record reveals that Bradford's counsel was concerned that the written transcript, which had been prepared by the state and which used the word "INAUDIBLE" at several points during the interrogation, was incomplete and might mislead the jury. By offering to play the tape of the confession following Bradford's

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case-in-chief. *Id.* at 636, 106 S.Ct. at 1411. Both *Edwards* and *Jackson* are rooted in *Miranda*. "*Jackson* simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment." *Harvey*, 494 U.S. at ___, 110 S.Ct. at 1180.

[5] Although the government did introduce an edited transcript of the confession prior to Bradford's testimony, that transcript was admitted solely for use at the suppression hearing on the second day of the trial and was not presented to the jury.

direct testimony and cross-examination, Bradford's counsel hoped to persuade the jury, as he stated during his closing argument, that the defendant "was tired, he was beat, he was talking low, he was scared, and he was just kind of giving out statements." For our purposes, the key point is that it was Bradford, and not the prosecution, that offered the confession into evidence. Under these circumstances, *Harris*, and not *Edwards*, is decisive.

II.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner next argues that because a Louisiana appeals court found that his prosecution violated the Double Jeopardy Clause, his attorney's failure to raise a double jeopardy defense at trial deprived him of the effective assistance of counsel. Bradford was prosecuted for attempted first-degree murder and the underlying felony of attempted armed robbery. The jury found him guilty of attempted manslaughter, the responsive crime to the charge of attempted first-degree murder, as well as of attempted armed robbery. A Louisiana appellate court vacated Bradford's attempted manslaughter conviction after finding that he was twice put in jeopardy when he was prosecuted for both first-degree murder and the underlying offense of armed robbery. *State v. Bradford*, 514 So.2d 534, 535 (La.App. 3d Cir.1987).[6]

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[6] Louisiana law provides that in double jeopardy cases where the defendant has been convicted of multiple punishments for the same criminal conduct, "the appropriate

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The thrust of petitioner's argument is as follows: Had his counsel raised a double jeopardy objection at trial, the state would have probably opted to prosecute him for the "more serious offense" of attempted first-degree murder instead of attempted armed robbery, which in turn would have likely resulted in an attempted manslaughter conviction. Because an attempted manslaughter conviction carries a less serious penalty than an attempted armed robbery, "Bradford would be looking at release in a few short months by this time – rather than another 40 years of hard labor."

We are not persuaded. As the state correctly observes, there is some question whether attempted first-degree murder is in fact a more serious offense than attempted armed robbery; the latter is punishable for nearly as long (49.5 years instead of "not more than fifty (50) years) and – unlike attempted first-degree murder – is without benefit of parole, probation or suspension of sentence. *Compare* La. Rev.Stat.Ann. §§ 14:31 and 14:27 D(1) to §§ 14.64 and 14.27 D(3).

More fundamentally, under *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984), a petitioner must show that his trial attorney

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procedure at the appellate level is to eliminate the effect of the judgment as to the less severely punishable offense." *State v. Doughty*, 379 So.2d 1088, 1091 (La.1980). Accordingly, the court vacated Bradford's conviction and sentence for attempted manslaughter, which carried the less severe penalty of the two offenses. *Bradford*, 514 So.2d at 535.

made errors so serious that he failed to function as counsel guaranteed by the Sixth Amendment, and that petitioner was denied a fair and reliable trial as a result. Bradford has not met this burden. The scenario posited in petitioner's brief is speculative at best, and there is no evidence that his counsel would have better served Bradford by pursuing a trial strategy that would have forced the state to rely solely on the attempted first-degree murder charge.

As it so happened, Bradford was convicted of attempted manslaughter instead, but the clarity of hindsight may reveal only part of the story. It is equally plausible to argue that the jury may have decided to convict Bradford of the less serious offense of attempted manslaughter, instead of attempted first-degree murder, in view of the more severe penalty it imposed by also finding him guilty of attempted armed robbery. Had the jury been faced solely with the attempted first-degree murder charge, and with no attempted armed robbery count, it might not have returned the attempted manslaughter conviction. While this, too, is speculative, it shows that petitioner's putative chain of events, which supposedly stem from the unprofessional conduct of his trial counsel, are too indefinite to show prejudice. *See Murphy v. Puckett*, 893 F.2d 94, 96 (5th Cir.1990) (under *Strickland*, trial counsel's errors must be both unprofessional and create a reasonable probability that the result of the proceeding would have been different). Because Bradford fails to show prejudice by his counsel's failure to raise the double jeopardy issue, his ineffective assistance of counsel claim does not entitle him to relief.

III.

BRADFORD'S SENTENCE

Petitioner further contends his prison sentence is so excessive that it amounts to cruel and unusual punishment under the Eighth Amendment. The trial judge sentenced Bradford to the maximum penalty allowed by Louisiana law: 49.5 years imprisonment at hard labor, without possibility of parole, probation or suspension of sentence. Bradford has already argued unsuccessfully on direct appeal that his sentence was excessive under the Louisiana constitution. *See Palmer,* 447 So.2d at 1169. Renewing his claim that "[t]his sentence is excessive under any measure," Bradford would have this court reverse his punishment as violative of the proportionality requirement set forth in *Solem v. Helm,* 463 U.S 277, 290-92, 103 S.Ct. 3001, 3010-11, 77 L.Ed.2d 637 (1983).

This argument, which rests largely on petitioner's claim that he was "hardly a career criminal," is spurious. Significantly, the *Solem* analysis has been replaced by the Court's recent decision in *Harmelin v. Michigan,* ___ U.S. ___, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991), which, while preserving a constitutional proportionality requirement, also focuses almost exclusively on a comparison of the gravity of the offense and the harshness of the punishment. *See McGruder v. Puckett,* No. 91-1224, ___ F.2d ___ (5th Cir.1992) (forthcoming). Bradford's punishment was hardly disproportionate. At the sentencing hearing, the trial judge noted that Bradford had subjected his victim, Paul Moores to "torture for an extended period of time," so that "Moores would probably have suffered less had he been murdered." Calling Bradford's crime "one of the

most brutal offenses that the Court has heard or has seen both as an Assistant District Attorney, when I did that, and also as a Judge," the court sentenced him to the maximum penalty under Louisiana law. The sentence was harsh, but so was the crime. Beyond comparing his offense to an armed robbery for which the victim previously served twelve years in a California prison, petitioner makes no showing that his punishment was so disproportionate as to violate the Eighth Amendment.

IV.

BRADFORD'S TRIAL

Finally, petitioner takes exception to several aspects of his trial, claiming the judge erred in admitting into evidence bloodstained clothing allegedly seized in violation of his Fourth Amendment rights; that the court's decision to prevent him from cross-examining the victim on a related civil lawsuit violated the Confrontation Clause; and that the prosecutor made improper remarks during closing argument that denied petitioner a fair trial. We reject these claims and address each in turn.

First, the Louisiana appellate court specifically found that Bradford was unable to show a right to privacy in the blood samples taken from his clothing and boots at the time of his arrest; the government was therefore justified in seizing them in order to prevent the destruction of evidence. *See Palmer*, 447 So.2d 1164-65. That court also held that the trial judge acted properly in refusing to allow Bradford's counsel to cross-examine the victim regarding a civil suit Moores had filed against a cab

company for failing to transport him immediately following the offense. *Id.* at 1165-66. The Confrontation Clause was not violated because the trial court retains wide latitude to impose reasonable limits on cross-examination when the defendant is inquiring into the potential bias of a prosecution witness. *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). Taking Moores's testimony on balance, we do not believe the jury would have received a significantly different impression of his credibility had defense counsel been permitted to cross-examine him on this subject. *Id.* at 680, 106 S.Ct. at 1436.

Finally, petitioner asserts that the prosecutor's closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristonforo*, 416 U.S. 637, 641, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)). Specifically, he contends, "the prosecution opine[d] in closing argument that Bradford was a liar." This falls short of a due process violation, just as the *Darden* prosecutor who referred to the defendant as an "animal" during closing argument did not violate his rights. 477 U.S. at 179, 106 S.Ct. at 2410. As we have recently warned: "We must view the prosecutor's statement in light of [Bradford's] entire trial, for 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's arguments standing alone.' " *United States v. Park*, 947 F.2d 130, 138 (5th Cir.1991) (quoting *United States v. Young*, 470 U.S. 1, 11, 105 S.Ct. 1038, 1044, 84

L.Ed.2d 1 (1985)). We agree with the magistrate's observations that while the prosecutor may have accused Bradford of lying, these comments "were neither persistent nor pronounced when considered within the context of the entire closing argument," and they did not violate his substantive rights.

V.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4640

GORDON LEE BRADFORD,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana

ON PETITION FOR REHEARING

(MARCH 23, 1992)

Before POLITZ, Chief Judge, BROWN and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

/s/ Edith H. Jones 3/19/92
United States Circuit Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

GORDON LEE BRADFORD	*	CIVIL ACTION NO. 89-1273
VERSUS	*	SECTION "O"
ROBERT HILTON BUTLER, WARDEN LOUISIANA STATE PENITENTIARY	*	JUDGE SHAW
	*	MAGISTRATE TYNES

****

JUDGMENT

This matter was referred to United States Magistrate Pamela Tynes, for Report and Recommendation. After an independent review of the record, this Court concludes that the Report and Recommendation of the Magistrate is correct, and therefore, adopts the conclusions of the Magistrate.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner's application for a writ of *habeas corpus* is DISMISSED.

Signed this 9th day of August, 1990, in chambers at Lafayette, Louisiana.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

GORDON LEE BRADFORD	*	CIVIL ACTION NO. 89-1273
VERSUS	*	SECTION "O"
ROBERT HILTON BUTLER, WARDEN LOUISIANA STATE PENITENTIARY	*	JUDGE SHAW
	*	MAGISTRATE TYNES

****

REPORT AND RECOMMENDATION

In accordance with the Standing Order of this Court, this *habeas corpus* case was referred to the undersigned Magistrate for review, report and recommendation.

Petitioner, Gordon Lee Bradford, filed this *habeas corpus* action in the Western District of Louisiana in June 1989 seeking relief from convictions entered in the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana on September 17, 1982, upon which he is now incarcerated at Louisiana State Penitentiary at Angola.

PROCEDURAL BACKGROUND

Between September 13 and September 17, 1982, Gordon Lee Bradford was tried by a jury in the Fifteenth Judicial District Court on charges of attempted first degree murder and attempted armed robbery. On September 17, 1982, the jury returned guilty verdicts against Gordon Lee Bradford of attempted manslaughter in violation of LSA-R.S. 14:27 and 14:31, and of attempted armed

robbery in violation of LSA-R.S. 14:27 and 14:64, the attempted manslaughter conviction being a responsive verdict to the charge of attempted first degree murder. On February 24, 1983 the defendant was sentenced to 10½ years at hard labor on the attempted manslaughter conviction and to 49½ years at hard labor without benefit of parole, probation or suspension of sentence on the attempted armed robbery conviction, said sentences to be served concurrently.

Bradford's convictions were affirmed by the Third Circuit Court of Appeals on March 7, 1984. *State v. Palmer,* 447 So.2d 1159 (La.App.3rd Cir.1984). Thereafter, he filed an application for post-conviction relief alleging, *inter alia,* that the convictions of attempted manslaughter and attempted armed robbery imposed double punishment for the same offense. On September 18, 1987 the Third Circuit Court of Appeals granted Bradford's application for post-conviction relief holding that the conviction of attempted armed robbery placed Bradford in jeopardy of the offense of attempted first degree murder. Citing *State v. Doughty,* 379 So.2d 1088 (La.1980), the Third Circuit held that the appropriate remedy was to eliminate the effect of the judgment as to the less severely punishable offense, and accordingly, vacated the conviction and sentence for attempted manslaughter. *State v. Bradford,* 514 So.2d 534 (La.App. 3rd Cir. 1987).

Thereafter, on April 22, 1988 the petitioner's *writ of certiorari* and/or review to the Louisiana Supreme Court was denied. *State v. Bradford,* 523 So.2d 226 (La. 1988). All available state remedies have been exhausted and a review of the merits by this Court is now appropriate.

Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 397 (1982).

Because the issues raised by petitioner may be resolved by evaluation of the written record, there is no need for an evidentiary hearing. The law does not require an evidentiary hearing when the state court record is complete or the petitioner raises only legal claims that may be resolved without the taking of additional evidence. Habeas Corpus Rule 8(a); *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989); *Lavernia v. Lynaugh*, 845 F.2d 493 (5th Cir. 1988); *Williams v. Blackburn*, 649 F.2d 1019, 1021 (5th Cir. 1981).

ALLEGED GROUNDS FOR RELIEF

The seven grounds for relief asserted in Bradford's application for writ of *habeas corpus*, are:

(1) That admission of his confession created constitutional error because said confession was obtained in violation of his Fifth and Sixth Amendment rights;

(2) That admission of his blood-stained clothing created constitutional error because the clothing was seized in violation of the Fourth Amendment right against unreasonable searches and seizures;

(3) That he was denied the Sixth Amendment right to confront witnesses against him at trial;

(4) That improper remarks made by the prosecutor during closing arguments deprived him of a fair trial;

(5) That the attempted armed robbery conviction violates the protection against double jeopardy;

(6) That the sentence imposed for attempted armed robbery is disproportionate to the crime committed in

violation of the Eighth Amendment prohibition of cruel and unusual punishment; and

(7) That he was denied the Sixth Amendment right of effective assistance of counsel.

GROUND ONE

ISSUE ONE: ADMISSION OF CONFESSION VIOLATIVE OF CONSTITUTION?

Petitioner first argues that the admission of his confession at trial violated the Fifth and Sixth Amendments of the United States Constitution because the confession was obtained by the arresting officers during a custodial interrogation following his request for counsel. After a hearing pursuant to *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), the state trial court determined that the confession was voluntary and allowed the prosecutor to utilize the confession during cross examination. The confession was never admitted into evidence in its entirety.

First, the constitutional right to counsel during custodial interrogations arises out of the Fifth Amendment protection against compelled self-incrimination, *Michigan v. Jackson,* 475 U.S. 625, 629, 89 L.Ed.2d 631, 638, 106 S.Ct. 1404 (1986), whereas the Sixth Amendment guarantee to assistance of counsel assures the right to counsel at post arraignment interrogations. Because Bradford's confession was given on the morning of his arrest prior to arraignment, it is the Fifth Amendment right to counsel which is at issue here.

In *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981), the Supreme Court established a bright-line rule holding specifically that an accused person in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. *Id.*, at 484-485, 68 L.Ed.2d 378, 101 S.Ct. 1880. In *Solem v. Stumes*, 465 U.S. 638, 79 L.Ed.2d 579, 104 S.Ct. 1338 (1984), the Supreme Court reiterated the *Edwards'* rule stating that "once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him." 465 U.S. at 641, 79 L.Ed.2d 579, 104 S.Ct. 1338.

More recently in *Plazinich v. Lynaugh*, 843 F.2d 836 (1988), the Fifth Circuit Court of Appeals has held that the *Edwards'* [sic] rule is to be strictly and narrowly applied. 843 F.2d at 838; *Griffin v. Lynaugh*, 823 F.2d 856, 861 (5th Cir. 1987). In *Plazinich*, a police officer escorting Plazinich back to his cell after Plazinich has terminated interrogation based on his counsel's advice, advised Plazinich that his co-defendant, Patricia Taylor, had attempted to commit suicide. Shortly thereafter, Plazinich requested permission to speak to an assistant district attorney indicating that he would consider making a statement. Following another advisement of his Miranda rights, he executed a written confession. Plazinich argued that the officer's statement to him concerning his co-defendant's suicide attempt amounted to an "initiation" of further communication by the police in violation of

Edwards. The Fifth Circuit rejected that argument and stated specifically as follows:

> Moreover, we noted, the cases following *Edwards* "are clearly indicative to us that in the absence of some police interference with the exercise of the right to counsel of the accused, the *Edwards'* rule is to be strictly and narrowly applied[.]" (citations omitted). Our court has, in other words, rejected an interpretation of *Edwards* prophylactic rule that is divorced from the context of badgering police conduct from which the rule sprang.

Because the *Jackson* hearing held in the state court disclosed all the facts pertinent to Bradford's claim, there is no need for a federal evidentiary hearing. Testimony was obtained from Detective Dale Broussard[1], Officer Charles Roger[2], and Officer Jackie Felps[3]. Having reviewed the testimony of the foregoing officers, and of Bradford, this Court concludes that although Bradford may have invoked the right to counsel, he subsequently initiated a conversation with Officer Broussard inquiring what was going to happen to his co-defendant, Ruby Palmer. The facts of this case are similar to those of *Plazinich*, to the extent that Bradford's reinitiation of communication with the police arose from his concern for his co-defendant. This Court concludes consistent with *Plazinich* that the officer's response to Bradford's inquiry

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[1] Tr. Pages 179-188.

[2] Tr. Pages 189-223.

[3] Tr. Pages 41-62.

concerning co-defendant, Ruby Palmer, cannot be interpreted as any overreaching or badgering by the police, and therefore, does not violate the spirit of *Edwards*. Furthermore, even if the Court concluded that the confession had been obtained in violation of *Edwards*, this Court concludes that the use of the confession to cross examine Bradford at trial constitutes harmless error.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Court described the harmless error rule as follows:

> "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Id. at 24, 87 S.Ct. at 828. The only crime of which Bradford now stands convicted is attempted armed robbery. Therefore, our inquiry is necessarily focused toward whether the use of the confession to cross examine Bradford was harmless beyond a reasonable doubt with respect to this conviction. A review of the cross examination of Bradford reveals that the statement was used to cross examine Bradford on three occasions[4]. This Court finds that the evidence of Bradford's guilt was overwhelming even absent the confession-based cross examination. Paul Moores identified Bradford as his assailant, testified that Bradford had held a gun upon him and requested the $700.00 which he had left with the bartender at the Southern Spirits Lounge, and that Bradford had beaten him with a pool stick. In addition, Bradford's clothes and

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[4] Tr. Pages 553, 561-562.

boots were stained with Paul Moores' blood. Thus, this Court concludes that the police did not violate the *Edwards'* rule in obtaining the Bradford confession, and furthermore, that even if the confession was obtained in violation of *Edwards* that the use of the confession at trial was harmless error.

ISSUE TWO: SEIZURE OF CLOTHING VIOLATIVE OF FOURTH AND FOURTEENTH AMENDMENT RIGHTS?

Petitioner Bradford and co-defendant Palmer were apprehended in a room at the Acadian Motel during the early morning hours of February 5, 1982 having been given information as to their whereabouts by two female witnesses. Bradford complains of the seizure of his clothing on grounds that there was no legal standing for the officers to seize the evidence. The record before the Court belies this argument. The victim, Paul Moores, had given the investigating officers a description of the individuals who attacked him, and two additional female witnesses had provided the police with information as to their whereabouts. Furthermore, once the petitioner was in custody, the officers were authorized to seize the blood-stained clothing under *Cupp v. Murphy*, 412 U.S. 291, 296 (1973), *Schmerber v. California*, 384 U.S. 757 (1966), and *Ker v. California*, 374 U.S. 23 (1963) in order to prevent the destruction of evidence. The forensic value of the blood stains could easily have been removed from the clothing if they had not been seized immediately. Accordingly, petitioner's fourth amendment arguments do not support the right to *habeas* relief.

ISSUE THREE: DENIAL OF RIGHT OF CONFRONTATION

Third, petitioner submits that his constitutional right to confrontation of witnesses through cross-examination was violated by the trial court's refusal to allow the victim, Paul Moores, to respond to a question calculated to reveal that Moores had filed a civil suit against a cab company whose driver had refused, despite Moores' obvious injuries, to transport or summon assistance for Moores shortly following the events at issue. The transcript reveals that when defense counsel inquired whether Moores had filed a civil suit against a cab company, the court sustained the state's objection on the ground of irrelevance.[5] Petitioner argues that evidence of the civil suit was relevant as it would have revealed to the jury that Moores' testimony was motivated by pecuniary interest.

The test for determining whether the constitutional right of confrontation has been denied by a trial court's refusal to allow a particular line of cross examination is set forth in *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) wherein the court held that a limitation of cross examination results in constitutional error where a reasonable jury would have received a significantly different impression of the witnesses credibility had defense counsel been permitted to pursue his proposed line of cross examination. *Id.* at 680, 106 S.Ct. at 1436.

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[5] Tr. Page 247, Lines 8-19; Tr. Page 250, Lines 3-9.

While Moores' admission of the existence of the civil suit may arguably have persuaded the jury that Moores had some interest in exaggerating the degree of injuries suffered on the night of this incident, it is highly improbable that evidence of the civil suit would have caused them to discount Moores' testimony concerning Bradford's guilt. From a legal standpoint, Bradford's convictions are irrelevant to the issues raised in the civil lawsuit against the cab company. Thus, the probability that Moores' testimony concerning Bradford's guilt was unduly biased because of the civil suit is minimal. Also, Dr. Lawless Bourque, the physician who examined Moores shortly after he was beaten, testified at trial concerning the degree and extent of Moores' injuries thereby curing any exaggeration of injuries testified to by Moores. In sum, even if the line of questioning concerning the civil suit had been permitted, it is not probable that the jury would have received a significantly different impression of Paul Moores' credibility. Petitioner's claim for denial of his right of confrontation fails to rise to the level of constitutional error.

ISSUE SIX: EXCESSIVE SENTENCE

Petitioner next argues that the imposition of the maximum statutory sentence for attempted armed robbery, *i.e.* a term of 49-1/2 years imprisonment at hard labor, without benefit of parole, probation or suspension of sentence, was excessive and in violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment. More specifically, the petitioner argues that the sentence was harsh considering his status as a first offender, that the sentence was disproportionate to the sentences

imposed on other criminals for other crimes in the same jurisdiction, and finally, that the sentence imposed was disproportionate to sentences imposed for the same crime in other jurisdictions.

In *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), the United States Supreme Court set forth criteria for evaluating the constitutionality of sentences imposed, as follows:

> "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Solem, 463 U.S. at 292, 103 S.Ct. at 3010. However, the Court also noted that "[i]n view of the substantial deference that must be accorded legislatures in sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Id.* at 290 n. 16, 103 S.Ct. at 3009 n. 16; *Passman v. Blackburn*, 797 F.2d 1335, 1350 (5th Cir. 1986).

Although Bradford's sentence may appear harsh on the face of the crime, and his ineligibility for parole may seem to favor his argument that his sentence is unconstitutionally severe, the crime of attempted armed robbery is in general a very serious felony, and the facts of this case establish the commission of a heinous and sadistic offense. The victim, Paul Moores,[6] was beaten in the

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[6] Paul Moores' testimony, Tr. Pages 126-149, 164-173, and 229-299.

head by Bradford with a pool stick[7], burned with a lighter[8], kicked in the head[9], cut or stabbed in the head with a knife[10], stripped naked and tied with his hands behind his back[11], forced to perform an unnatural sex act[12], and tortured otherwise over a period of approximately 4 hours during the early morning of February 5, 1982, at the hands of the defendant, Bradford and others. Moores was in fear for his life during this time period[13]. In addition, Bradford also held a gun on Moores toward the end of this series of events[14] to try and persuade him to call the bartender with whom Moores had left the $700.00 which Bradford was attempting to take from Moores.[15] Furthermore, Dr. Lawless Bourque testified that Paul Moores sustained a brain concussion and a basal skull fracture[16] as a result of the beating. Further, he testified that his examination of Moores revealed a face swollen from being beaten, a bloody nose, numerous lacerations, bruises and hematomas on the head, and burns on the buttocks.[17]

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[7] Tr. Page 272, Line 13 through Tr. Page 273, Line 8.

[8] Tr. Page 282, Lines 2-10.

[9] Tr. Page 294, Lines 4-22.

[10] Tr. Page 282, Lines 3-12; Tr. Page 294, Lines 19-26.

[11] Tr. Page 280, Lines 16-25.

[12] Tr. Page 281, Lines 15-25.

[13] Tr. Page 298, Lines 3-23.

[14] Tr. Page 171, Lines 13-21.

[15] Tr. Page 284, Line 19 through Tr. Page 286, Line 19.

[16] Tr. Page 458, Lines 2-11.

[17] Tr. Page 456, Lines 20-24; Tr. Page 457, Lines 14-27; Tr. Page 456, Lines 22-27.

Prior to imposition of sentence, the sentencing judge stated that he found the offense committed by Bradford one of the most brutal that he had ever encountered.[18] Further, the sentence imposed was within statutory limits, and the sentencing judge expressed logical reasons for imposition of the maximum penalty. The fact that this offense was a first offense does not preclude imposition of the maximum penalty under the circumstances.

Turning to the second and third aspects of petitioner's argument, this Court need not engage in an extended analysis because the United State Fifth Circuit Court of Appeals has previously addressed and rejected petitioner's arguments. In *Little v. Butler,* 848 F.2d 73, 77 (1988), the Fifth Circuit, citing *Passman v. Blackburn, supra,* concluded that the maximum penalty of 49-1/2 years for the crime of attempted armed robbery did not constitute cruel and inhuman punishment either when compared to other Louisiana statutes covering a number of other violent crimes or when compared to the maximum penalties imposed for similar offenses in other states. In reaching its conclusion, the court explained as follows:

> "Moreover, it is not unusual for states which have 'attempt' statutes to make the penalty for attempt one-half that for the consummated crime."

Id. The maximum penalty available for armed robbery in Louisiana is 99 years without benefit of parole. Thus, the sentence imposed was not excessive and does not violate

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[18] Tr. Page 770, Lines 17-25.

the Eighth Amendment of the United States Constitution under the principles set forth in *Solem v. Helm.*

ISSUE FOUR: IMPROPER CLOSING REMARKS OF PROSECUTOR

Petitioner next submits that he was denied a fair trial because of improper remarks made by the assistant district attorney, Caroll Spell, during his closing arguments, specifically including a reference to the commission of an offense other than that of attempted armed robbery, and three separate expressions of the district attorney's personal opinion of Bradford's lack of credibility.

Petitioner's first complaint, that the district attorney made an impermissible statement under Louisiana Code of Criminal Procedure Article 770(2) indicating that Bradford had committed a crime other than attempted armed robbery, is based on the following excerpt from closing arguments:

> "So, I have no doubt that an attempted armed robbery took place. *I think maybe even a completed armed robbery;* however that was not the charge, and you can't return that verdict, I wish you could, but in this case the state has charged an attempt, and we'd be certainly satisfied with that." (emphasis added).

Tr. 629, lines 24-29.

Petitioner's second complaint, that the district attorney repeatedly expressed his personal opinion as to Bradford's credibility, is based on the following excerpts:

> "Gordon will have you believe that this was so that he could hold off this fellow named Jim and

> these other people, and do his good deed and protect the victim. *I don't believe that.*" (emphasis added).

Tr. 628, lines 19-23.

> "The defendant testified. If you believe what the defendant told you, I think that I would have to apologize to you for putting him on trial for these things. *But I, personally, don't believe it.*" (emphasis added).

Tr. 631, lines 13-17.

> "If the victim's lying about that, I believe that we're all mistaken, *and the defendant would be lying too.*" (emphasis added).

Tr. 688, lines 27-29.

Contemporaneous objections were asserted to the aforecited remarks, and following the removal of the jury from the courtroom, a motion for mistrial was urged on behalf of petitioner. The trial court denied the motion for mistrial and gave no cautionary instructions to the jury.[19]

This Court rejects petitioner's claim for habeas relief on grounds that the district attorney's closing remarks violated Louisiana Code of Criminal Procedure Article 770(2)'s prohibition of references to other crimes committed by the defendant. The district attorney in this case made no reference to any evidence outside of the record, but instead, merely suggested the strength of the state's case based on the evidence presented. Further, he cured any prejudice which may have resulted by pointing out immediately that the jury could not return a verdict of the

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[19] Tr. Pages 710-712.

completed crime of armed robbery because it was not charged. Finally, the prosecutor's expressions of personal opinion about the defendant's lack of credibility were neither persistent nor pronounced when considered within the context of the entire closing argument.

In *Edwards v. Scroggy*, 849 F.2d 204, 211 (5th Cir. 1988), the court expressed the appropriate standard of review for a *habeas* court considering improper closing argument by a prosecutor, as follows:

> "The Supreme Court in *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), considered in detail the scope of review of a federal *habeas* court in considering improper closing argument by the prosecutor. The court stated: "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' . . . Moreover, the appropriate standard of review for such a claim on writ of *habeas corpus* is 'the narrow one of due process and not the broad exercise of supervisory power.' " *Id.* 477 U.S. at 180-81, 106 S.Ct. at 2471-72, 91 L.Ed.2d at 157 (quoting *Donelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)."

849 F.2d at 210.

The court expounded further on the standard, as follows:

> "As we stated in *Felde v. Blackburn*, 795 F.2d 400, 403 (5th Cir. 1986), *cert. denied*, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987), 'To establish that a prosecutor's remarks are so inflammatory as to prejudice the substantial rights of a defendant, the

> petitioner must demonstrate either persistent and pronounced misconduct or that the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.' "

Id.

Evaluating the remarks of the prosecutor in this case under the foregoing standard, this Court finds that the remarks of the prosecutor in this case simply do not measure up to the requisite standard. The evidence of Bradford's guilt was substantial and the jury's guilty verdict would probably have been returned absent the prosecutor's remarks. In addition to the victim's identification of the defendant, Bradford, as his assailant, Dr. Lawless Bourque testified concerning the serious injuries sustained by Moores. The hair and blood samples taken from the pool stick introduced into evidence were identified as those of Paul Moores.[20] In addition, Bradford's boots, blue jeans and long-john shirt were all stained with blood which matched Moores' blood type.[21] Petitioner is not entitled to *habeas* relief on this ground.

ISSUE FIVE: DOUBLE JEOPARDY

The petitioner submits that the attempted armed robbery conviction for which he is now serving a sentence continues to violate the double jeopardy clause of the Fifth Amendment, despite the Louisiana Third Circuit's vacation of the attempted manslaughter conviction and

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[20] Tr. Pages 635-637, and 638-639.

[21] Tr. Pages 639-641, and 641-642.

sentence. Specifically, Bradford argues that the Third Circuit failed to apply the *Doughty*[22] rule correctly, because they failed to eliminate the effect of the less severely punishable offense. Petitioner's argument is, however, flawed to the extent that he compares the maximum potential sentences for attempted armed robbery with that for the charged offense of attempted first degree murder, rather than the maximum potential sentence for the offense of which he was ultimately convicted, attempted manslaughter. Because the maximum potential sentence for the offense of attempted manslaughter is the less severely punishable offense when compared to that for attempted armed robbery, petitioner's argument fails.[23]

Second, petitioner argues that the jury's return of the responsive verdict of attempted manslaughter is an implicit acquittal of attempted first degree murder and the predicate offense of attempted armed robbery as well. Again, petitioner's argument is erroneous. The double jeopardy clause of the Fifth Amendment protects a defendant from multiple prosecutions and/or punishment for the same offense; it does not preclude punishment altogether. An acquittal of the charge of first degree murder does not preclude a conviction of the crime of attempted

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[22] 379 So.2d 288 (La. 1980).

[23] The maximum sentence for the offense of attempted manslaughter is 10-1/2 years. LSA-R.S. 14:27(3) and 14:31(2)(b), while the maximum sentence for attempted armed robbery is 49-1/2 years without benefit of parole. LSA-R.S. 14:27 and 14:64.

armed robbery, nor does it preclude imposition of punishment for that crime. To the extent that Bradford was subjected to double jeopardy by the return of convictions of attempted manslaughter and attempted armed robbery, the relief granted by the Third Circuit Court of Appeal cured Bradford's jeopardy exposure. This ground for *habeas* relief is, therefore, without merit.

ISSUE SEVEN: EFFECTIVE ASSISTANCE OF COUNSEL

Finally, petitioner submits that his court appointed attorney, Paul Gianfala, failed to provide effective assistance of counsel because he failed to file a motion to quash the charged offense of attempted armed robbery on grounds of double jeopardy. Claims of ineffective counsel are reviewed under the two prong standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The test requires first, "a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment," and second, a showing that the deficient performance so prejudiced the defense that the defendant was deprived of a fair and reliable trial. *Sawyer v. Butler*, 848 F.2d 582, 588 (5th Cir. 1988). The burden that *Strickland* imposes on a defendant is severe. *Proctor v. Butler*, 831 F.2d 1251, 1255 (5th Cir. 1987). In evaluating whether counsel's alleged errors prejudiced the defense, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceedings." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. Rather, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. at 2068. "It is not our role to assume the existence of prejudice." *Czere v. Butler,* 833 F.2d 59, 64 (5th Cir. 1987). On the contrary, *Strickland* requires that the defendant affirmatively prove prejudice. *Id. Strickland* also authorizes the court to proceed directly to the question of prejudice. Therefore, if Bradford fails to demonstrate prejudice, the alleged deficiencies in Gianfala's performance need not even be considered. See *Strickland,* 466 U.S. at 698-99, 104 S.Ct. at 2070.

Turning directly to the issue of prejudice, this Court finds that Bradford has failed to affirmatively prove that he was prejudiced by his counsel's failure to recognize and raise the issue of double jeopardy prior to trial. Petitioner's argument assumes that if the double jeopardy issue had been raised that the prosecutor would have dismissed the armed robbery charges, and that he would have ultimately received a lesser sentence than that which was ultimately imposed for the conviction of attempted armed robbery. This Court, however, may not engage in hindsight speculation. It is equally plausible that the prosecutor would have dismissed the attempted first degree murder charges and proceeded to conviction on the attempted armed robbery charges. This Court finds that although there may have been some conceivable effect on the outcome of the proceeding as a result of Gianfala's failure to file a motion to quash the attempted armed robbery charge, *Strickland* clearly dictates that such a showing is not sufficient to establish the right of *habeas* relief on grounds of ineffective assistance of counsel. Furthermore, any prejudice which may have

devolved upon the petitioner as a result of counsel's failure to recognize the jeopardy issue prior to trial was alleviated by the Third Circuit's vacation of the attempted manslaughter conviction. Thus, Bradford has failed to affirmatively establish the prejudice prong of *Strickland* necessary to entitle him to *habeas* relief on the ineffective counsel claim.

CONCLUSION

For all of the foregoing reasons, this Court concludes that petitioner, Gordon Lee Bradford, has not presented a claim entitling him to relief under federal *habeas* law. Accordingly, it is recommended that petitioner's application for *habeas corpus* relief be DENIED and that this suit be DISMISSED.

Under the provisions of 28 U.S.C. sec. 636(b)(1)(C), the parties have ten (10) days from receipt of this Report and Recommendation after it is filed with the Clerk of Court to file any objections for the Court's consideration before decision by the Court. FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATION CONTAINED IN THIS REPORT WITHIN TEN (10) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDINGS ON APPEAL.

Signed this 26th of June, 1990, in chambers at Lafayette, Louisiana.

/s/ Pamela A. Tynes
PAMELA A. TYNES
UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

GORDON LEE BRADFORD	CIVIL ACTION NO. 89-1273
VERSUS	
ROBERT HILTON BUTLER, WARDEN LOUISIANA STATE PENITENTIARY	SECTION "O"
	JUDGE SHAW
	MAGISTRATE TYNES

NOTICE OF APPEAL

Notice is hereby given that GORDON LEE BRADFORD, petitioner above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Judgment of the United States District Court for the Western District of Louisiana, dismissing petitioner's application for writ of habeas corpus, entered in this action on the 10th day of August, 1990.

Angola, Louisiana this 16th day of August, 1990.

/s/ Gordon Lee Bradford
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